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A Comparative Analysis of the Consultative Process in Appointment of Judges in Higher Judiciary

by
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I. JUDICIARY AND RULE OF LAW

Central to the emergence of judiciary as a significant institution in the governmental structure has been the realisation that having an independent and separate branch of the judiciary is crucial to the ideal of rule of law.[1] Modern constitutional democracies operate on the principle of limited governmental power and on the edifice on the principle of rule of law. An independent and separate judicial branch is indispensible to contain the overreach of the governmental authorities and to maintain the rule of law.[2] If judicial branch is nothing but an extension of the executive or legislative authority of the state, it can never ensure protection of the individual against the excesses of the state authorities.[3] In jurisdictions where the judiciary does not enjoy an independent status, the threat to the durability of a settled rule of law has been very real.[4] A separate branch of judiciary

independent from other governmental authorities is the fulcrum of a rule of law principle as it ensures an unbiased application of law in the relational dynamics between the government and the people.[5]

The independence of judiciary functions as a shield of protection against the possible abuse of power by the executive and legislative mechanism of the state by enforcing the limiting principles of the constitution.[6] Over a period of time, this independence of the judiciary has become one of the founding principles of modern constitutional democracies.[7] An independent judiciary enforces the structural limitations on the powers of the governmental organs so that they do not violate or deviate from the value orientation of the constitutional framework.[8] An independent judiciary provides a meaning to the guarantee of individual rights and liberties[9] by preserving their sanctity against governmental excesses.[10] A judiciary not independent and not free from the clutches of the other governmental branches; jeopardises the people's faith the viability of the legal system to redress their grievances.[11] This lack of faith is likely to destabilise the very foundations of a legalised society by regularising extra-legal measures for resolutions of disputes as a routine in the community life of the society. As the most pragmatic hope of people against governmental abuse of power[12], it is perhaps

the most indispensible element of the principles of governance to ensure that the ideal of rule of law is no merely a mirage.[13]

II. IMPORTANCE OF JUDICIAL SELECTION METHODS

Thus, that the judicial organ of the state is functioning efficiently is essential to the idea of good governance. The success of any judicial system depends not only on the professional efficiency of judges, but also on the integrity of judges.[14] The character and courage of judges is their personal characteristics innate to their personality or cultivated over a period but cannot be simplistically attributed to the legal framework.[15] Thus, the parameters on which judges are selected and the manner in which they are selected is an important issue which has a significant impact on both judicial independence and judicial accountability.[16] The judiciary's capacity to retain its independence amidst the inevitable pressures and persuasions from different quarters depends fundamentally on the personality of the judges.[17] The judiciary's commitment to the ethical standards of judicial conduct also depends substantially the sense of personal morality cultivated by the judges. It is indispensible to ensure that only individuals with requisite moral clarity and integrity are appointed as judges. A proper process selecting judges on the right parameters contributes substantially to both judicial independence and judicial accountability.

III. VARIETY OF JUDICIAL SELECTION METHODS

Analysing the historical trends in relation to various methods of judicial selection, Karl Lowenstein identified five distinct modalities by which judges have been appointed in different legal frameworks in different points of time[18]:

1. In some jurisdictions, the practice of purchasing judicial office was prevalent. The conferring of judicial office was intrinsically linked to the idea of a cultural elite produced by the socioeconomic base of the rich. This system, over a period of time, also imbibed the practice of inheriting judicial office.
2. In many countries, where judiciary is also deemed to be authority of democratic expression, one can find the system of where judges are elected to the office just like other political organs. Their duration in the office may be for life or may be for a fixed term but the defining feature of this form of judicial selection is its emphasis on adherence to a democratic process even for the judicial organ.
3. The more traditional modality of judicial selection has been the appointment of judges by the executive authority. This is one of the most common modalities of judicial selection especially in jurisdictions where there in a pre-eminence of the executive authority, if not in paper, than at least in terms of constitutional conventions.
4. There are certain other jurisdictions where judges are elected by members of the Parliament. As an alternative to vesting the power of appointment in the hands of the executive, this system vests the power in the collective wisdom of the legislative organ.
5. There are also certain evolved mechanisms where there power of judicial appointment is not exclusively concentrated in hands of one organ but is shared amongst them. The appointment process of the Federal Judges in United States provides the most striking example of this mechanism. A federal judge in United States is appointed when the nomination by the President is confirmed by the senate. Neither the President, nor the Senate can ensure the appointment of a judge without each other's cooperation.

The choice of the selection methods reflects the attitude of the people and the government on the question of judicial independence and judicial accountability.[19] Even in the same country, different modes can be found in different times reflecting the prevailing philosophy on judicial appointment.[20] In countries built on the foundation of federalism, different methods of judicial selection can be prevalent in different parts of the country

simultaneously. For example, currently, in United State of America, as many as five separate selection methods can be seen to be in operation.[21]

IV. THE APPOINTMENT METHOD

The appointment method of judicial selection is the most traditional and by far the most prevalent mode of selecting judges for the higher judiciary. It refers to a process where a designated authority has the power to appoint the judges after such process of selection as may be mandated by the law or according to its conventions. The appointing authority may be the executive or legislative authority or even an independent commission.

Consultative Process in the Appointment Method

In jurisdictions which follow the appointment method of judicial selection for judges of the higher judiciary, though there is a designated appointing authority which takes the final decision regarding appointments to be made, there is usually the involvement of other state institutions in the appointment process. The power of appointment is usually not vested with a single authority without the involvement of any other authority. Though the power of appointment is concentrated in the hands of a single authority, there is a consultative process warranted by the law before the appointment can be confirmed. Usually, in such cases, the consultative process is with the designated members of the judiciary or with a panel specifically constituted for this purpose.

Though the appointing authority might not be bound to accept the opinion of the panel, the very fact of a consultative process ensures that the appointment process cannot become completely arbitrary. The appointing authority cannot ignore the recommendations of the panel whimsically as it will severely damage its credibility and it will be suspected of compromising the integrity of judicial appointments for political agendas. This mechanism is also a useful method for involving the judiciary in the process of judicial appointments. This way, the judiciary can ensure that that the appointment procedure is not used as a subversive device to undercut the independence of judiciary by appointment of people with questionable integrity and over political inclinations.

The nature of this consultative process varies and is determined by the constitutional structure and the conventional practices prevalent in different

jurisdictions. The dynamics and nuances of this consultative process are usually a reasonable indicator of the health of the process by which judges are being selected. In a jurisdiction where the consultative process is minimal, the chances of the selection process being biased or corrupted is more. A robust consultative process on the other hand, ensures greater balance in the selection of judges.

Appointing Authority in Australia

The High Court of Australia is the highest judicial authority of the land. In different States of Australia, there are two separate but interrelated structures of the judiciary in relation to 'federal' and 'state' matters. However, the High Court of Australia functions as the single highest court of the land in relation to both 'federal' and 'state' matters.[22] In addition to having its federal jurisdiction under Article 71 of the Australian Constitution[23], the High Court also functions as the Highest Court of Appeal in relation to any matter arising from State Supreme Courts, regardless of the existence of any federal element in the dispute.[24]

Though Section 72 [i] of the Australian Constitution provides that the Justices of the High Court shall be appointed by the Governor-General in Council, in reality, the actual control over the appointment process is exercised by the Federal Government.[25] The Governor-General in Council has no independent authority on the matter and functions necessarily on the recommendations of the federal government.[26] A similar reality can be seen also in the appointment process of state level courts where the authority is exercised by the state governments.[27] Both the Governor-General in Council as the federal level and the Governor in Council at the state level

play a formal role[28] in the appointment of judges.[29] The real authority in this relation is exercised by the respective governments at the federal and state level.[30]

Consultative Process in Australia

In the federal government, the most important role regarding judicial appointments to the High Court of Australia is played by the federal Attorney General.[31] It is the office of the Attorney-General which initiates the process of filling up any vacancy in the High Court. The Attorney-General is responsible for making the necessary recommendations to the cabinet of the federal government of individuals to be appointed as judges to the High Court of Australia.

In the discharge of his functions in relation to the nominating appointees for the High Court, the Attorney General is not subject to extensive consultative requirements with any other institutional authority. The only statutory requirement[32] which he must fulfil before any appointment is made is to consult with the Attorney Generals of States in relation to the appointment.[33] Even in relation to this statutory requirement of consultation, no parameters exist as to the manner in which such consultation is supposed to be made. There is no clarity as to whether this consultation process can be merely nominal in substance without any real significance on the decision of the Attorney-General.[34]

Apart from this minimal consultative process, each individual Attorney General is free to follow such process as he may deem appropriate and consult such persons as he may deem necessary.[35] Generally, the Attorney Generals consult and seek opinions of a wide range of persons in the process of deciding upon the appointment of High Court Judges which apart

from various judicial offices and professional legal bodies also includes legal academics.[36]

As such there is no legal requirement for the Attorney General to consult with members of the judiciary[37] but it is not unusual for Attorney Generals to consult with the Chief Justice or other members of the judicial profession as they deem necessary. However such consultation is not necessary for the validity of the appointment process and it is also not uncommon for an Attorney General to ignore any advice or recommendation by way of such consultation.[38]

The report of the Senate Legal and Constitutional Affairs References Committee also discloses the practice of Attorney Generals to constitute an advisory panel for providing advice in the matter of appointment to the Federal Courts. Such an advisory panel usually consists of a senior member of the Attorney-General's department, a retired judge of the federal or state court or a senior member of the federal or state judiciary and the Chief Justice or a nominee of the Chief Justice.[39] The Advisory Panel is also empowered to conduct interview of prospective appointees in order to facilitate the preparation of its report on the nominated individuals.[40]

Despite this apparently wide ranging consultation, there is no definite process which the Attorney General is required to follow in respect to the modalities of the consultative process. There is no uniform or consistent

manner in which opinions are sought. Usually, the Attorney-Generals are known to have been following an unofficial consultation process wherein they make personal inquiries in relation to the prospective appointees.[41] However, these consultative practices are mostly unstructured and are not centred on any specific set of criteria in relation to which these inquires

are made.[42] There are no established or consistent parameters in relation to which views are sought about the prospective appointees.

Thus, the selection process undertaken by the office of the Attorney General is not necessarily an institutional framework of consistent practices. It depends more on the person occupying the office of the Attorney General and loose strands of traditional practices.[43] The nuances of the selection process are likely to be subject to the differing philosophies of individuals occupying the office of the Attorney-General.[44]

After finalising his recommendations, the Attorney-General forwards the list of recommended appointees to the Cabinet of the federal government which then takes a collective decision[45] regarding confirming or reject the names recommended by the Attorney-General.

Appointing Authority in United Kingdom

Pursuant to the series of constitutional reforms initiated in 2005 by the Constitutional Reforms Act, 2005, the Supreme Court was established in 2009. It replaced the Appellate Committee of the Houses of Lords and exercises similar jurisdiction as the Appellate Committee used to be vested with[46] and is the highest judicial authority in United Kingdom. The Supreme Court has also been vested with the jurisdiction to hear devolution issues which were earlier heard by the judicial committee of the Privy Council.[47] Although the court has jurisdiction to hear matters involving constitutional issues, it does not have the powers of a constitutional court[48] and thus cannot declare statutes to be unconstitutional.[49]

Though both the Prime Minister and the Lord Chancellor are involved in the appointment process of the Justices of the Supreme Court, the most important role in the entire process is played by the Selection Commission constituted under Schedule 8 of the Constitutional Reforms Act, 2005. Unlike the Judicial Appointments Commission constituted under Schedule 12 of the Constitutional Reforms Act, 2005 for appointment of all other judges[50], the Selection Commission in not a permanent body and meets only on an ad hoc basis.[51] The selection commission consists of the following[52];

"(a) the President of the Supreme Court;

(b) the Deputy President of the Supreme Court;

(c) one member of each of the following bodies—

(i) Judicial Appointments Commission;

(ii) Judicial Appointments Board for Scotland;

(iii) Northern Ireland Judicial Appointments Commission"

In case the office of the President or the Deputy President is vacant, the position in the commission is to be taken by the two senior most judges of the Supreme Court.[53] It is for the Lord Chancellor to nominate[54] one member each from the Judicial Appointments Commission, The Judicial Appointments Board for Scotland and the Northern Ireland Judicial Appointments Commission with the rider that at least one of such nominated persons has to be an individual who is not legally qualified.[55] However the power of the Lord Chancellor to make such nomination can be exercised only upon the recommendations of the respective bodies concerned.[56]

Consultative Process in United Kingdom

As stated earlier, the Selection Commission for the Supreme Court is not a permanent body. It is convened by the Lord Chancellor as when a vacancy

arises in the court.[57] The Selection Commission is expected to determine its selection process and makes recommendations on the basis of the application of the selection process so determined.[58]

There is a mandatory consultative process which the Selection Commission must adopt which involves

consultations the Lord Chancellor, the First Minister in Scotland, the First Minister for Wales and the Secretary of State for Northern Ireland.[59] The Commission is also required to consult with such senior judges who are not members of the commission and are not interested to be considered for selection.[60] If within the consultative process mandated in relation to senior judges of the Supreme Court, no judge of the courts of any part of the United Kingdom is to be consulted, the commission is required to consult the most senior judge of the courts of that part who is not a member of the commission and is not willing to be considered for selection.[61] After the consultative process, the Selection Commission is required to submit a report of its recommendations to the Lord Chancellor along with the details of the judges consulted under Section 27(2)(a) and (3) and such other information as may be required by the Lord Chancellor.[62]

Like the Selection Commission, the Lord Chancellor is also required to adhere to mandatory statutory consultation which includes such judges who were consulted by the Selection Commission under Sections 27(2)(a) and (3), the First Minister in Scotland, the First Minister for Wales and the Secretary of State for Northern Ireland.[63] When the Selection Commission submits its first report to the Lord Chancellor, he has three options; to accept the selection, to reject the selection or to require to commission to reconsider the selection.[64] When the commission submits its second selection after the feedback from the Lord Chancellor, he again has three options; to accept the selection, to reject a selection provided it was made after the reconsideration or to require the commission to reconsider the selection provided it was made after a rejection in the earlier stage.[65] After the third stage, the Lord Chancellor is required to notify the selection to the Prime Minister.[66]

Once a selection is notified to the Prime Minister by the Lord Chancellor, he must recommend the person whose name is so notified.[67] Also, there is categorical restriction on the Prime Minister to recommend any other name than the one notified to him by the Lord Chancellor.[68] It needs to be noted that the role of the Prime Minister in the entire process is mostly formal with no real power to reject a name notified to him.[69]

Appointing Authority in South Africa

Consisting of the Chief Justice, the Deputy Chief Justice and nine other judges, the Constitutional Court of South Africa is established by Section 167 of its Constitution. It is a constitutional requirement that each matter before the Constitutional Court has to be heard by at least eight judges.[70] The Constitutional Court of South Africa is the highest court of the country[71] with jurisdiction over constitutional matters and such other matters as the court may grant leave to on the ground of the matter concerning a question of law of general public importance.[72] It is the only judicial institution in the country with the authority to decide disputes between organs of state in the both national and provincial sphere, the constitutionality of any parliamentary or provincial bill and the constitutionality of any amendment to the Constitution.[73] It is also the final authority in relation to the constitutionality of any Parliamentary or Provincial Act or any conduct of the President.[74]

Though the appointing authority for Chief Justice, Deputy Chief Justice and other judges of the Constitutional Court is the President[75], a significant role is played by the Judicial Service Commission in the entire process. It needs to be noted that unlike Australia[76], England[77] and India[78], the President/Prime Minister, is not merely a nominal authority in the appointment process of judges and plays a substantial role in the selection of judges. However, the most important role in the entire process is played by the Judicial Service Commission, established under Section 178 of the Constitution of South Africa. It consists of 23 regular members and two

additional members who join the commission when the appointment is concerning a specific division of the High Court.[79] The Commission reflects a great diversity in its composition. Though of the 23 regular members, only eight are from the legal profession including judges, advocates, attorneys and law teachers and the majority consists of politicians[80], it still presents a much better balance than the earlier process which was completely dominated by the politicians.[81] This diverse composition of the Judicial Service Commission representing membership from a broad group of constituencies was one of the deliberate designs to restore the legitimacy of the judicial branch as whole which had lost credibility during the apartheid era.[82]

Consultative Process in South Africa

It may be noted that the appointment process to the Constitutional Court is in many ways different than to the other courts underlining the importance of the Constitutional Court in the governmental structure of South Africa.[83]

As per the procedure detailed in Section 174(4), the Judicial Service Commission, after conducting

interviews of the candidates, must send to the President a list of nominees containing three times more names than the number of appointment which need to be made. The President may either make appointments from the list or may communicate to the Judicial Service Commission if he finds any of the nominees to be unacceptable. In case the President finds any of the nominees to be unacceptable, he must advise the Judicial Service Commission with reasons. In case the President communicates the unacceptability of the nominees, the Judicial Service Commission must supplement the list with further nominees and the President is then required to make the remaining appointments from the supplemented list.

While selecting a nominee as judge of the Constitutional Court, the President must consult the Chief Justice and leaders of the parties

represented in the National Assembly.[84] While not expressly mentioned, the President can refer unacceptable names back to the Judicial Service Commission not more than one time, though the same has not been necessary even once.[85] While appointing the Chief Justice and the Deputy Chief Justice, the President is required to consult with the Judicial Service Commission and the leaders of all the parties represented in the National Assembly.[86]

While the process after the Judicial Service Commission has submitted the initial list of nominees to the President is sufficiently detailed in the Constitution of the Republic of South Africa, there is no definite legal prescription regarding the manner in which the Judicial Service Commission is required to decide upon the selection of nominees. The selection process for the first bench of the Constitutional Court in 1994 were done by interviews in a public session.[87] After the first year, the Judicial Service Commission endeavoured to establish a general practice wherein interviews were to be conducted in private. These efforts were abandoned after bitter resistance from within the Commission itself.[88] Since then though the deliberations of the commission are conducted in private, the interviews are conducted in open.[89]

Appointing Authority in India

The Supreme Court of India is one of the most powerful and influential judicial institutions in the world. Established under Article 124(1) of the Constitution of India, the Supreme Court has played a very crucial role in the evolution of democratic rule of law in India. It has been at the forefront of safeguarding the rights of the people[90] and in protecting the constitutional

values[91] from legislative and executive overreach. The Supreme Court of India is credited with expanding the scope of the rights available to the people of this country with purposive and innovative judicial interpretations of the constitutional provisions dealing with Fundamental Rights.

In terms of its jurisdictional sphere, the Supreme Court of India has a wider mandate than any of the comparable highest judicial authorities in other countries including the Federal Supreme Court of United States and the High Court of Australia.[92] It is the highest appellate body in the country with the power to hear appeals (both civil and criminal) from all the High Courts in different States.[93] It has original jurisdiction over matters pertaining to disputes between different state governments and also between a state government or group of state governments on one side and the central government on the other side.[94] It also has original jurisdiction in relation to the violation of the fundamental rights wherein the wronged person can directly approach the highest judicial authority of the country for the necessary redressal.[95]

A judge of the Supreme Court of India is appointed by the President of India. The constitutional prescription regarding the judges of the Supreme Court is contained in Article 124 of the Constitution of India which vests the authority to appoint a judge of the Supreme Court with the President of India. The President of India, however, functions only as the nominal head of the executive and the real executive authority is vested in the union government headed by the Prime Minister.[96] Thus, the decisions regarding appointments made by the President of India are not the independent decision of the President but are guided by the Council of Ministers in the union government.[97]

The Consultative Process in India

In relation to the appointment of Supreme Court judges, the constitution mandates a consultative process

to be undertaken by the appointing authority. The Proviso to Article 124(2) provides that for the appointment of any judges to the Supreme Court of India other than the Chief Justice, the Chief Justice of India must be consulted. It means that a person cannot be appointed as a judge of the Supreme Court unless the sitting Chief Justice has been consulted in that regard. Further, Article 124(2) also makes provision where other judges of the Supreme Court and also that of the High Courts may be consulted.

The major disputes and debates in India regarding the issue of judicial appointments have centred around the requirement of the consultative process mentioned above. There have been considerable stir in relation to the import of the consultative process prescribed in the constitutional framework. The most contentious aspect of the entire process has been the weight which is supposed to be given to the opinion of the Chief Justice in the matter of judicial appointments.[98] The history of the appointment process is chequered by a constant struggle for supremacy on the matter between the judiciary and the executive.[99]

The effect of the decisions of the Supreme Court in *Supreme Court Advocates-on-Record Assn.* v. *Union of India*[100] and *Special Reference No. 1 of 1998, In re*[101] has been that the power of appointing judges of the Supreme Court rests exclusively with the Chief Justice of India and the collegium of judges comprising of four senior most judges in the court. Both the decisions have significantly altered the scheme of the appointment process as it existed earlier. From being a primarily a consultative authority in the appointment process, the Chief Justice and the designated members of the collegium are now at the centre of the entire process with the executive playing more of a formal role. In fact, with the power of initiating proposals for appointment exclusively with the collegium and the collegium having the final say in case of any disagreements in the appointment process, the

executive now plays a primarily subsidiary consultative role in the entire process.[102]

In its judgments, the court provided a consultative role to the executive by stressing that the executive can raise objections on the candidature of any individual based on positive material on record.[103]

The court has mentioned that such judges of the Supreme Court who might have better knowledge of the suitability of the prospective appointee because of having come from the same High Court may also be consulted.[104] The court has also left it open for the collegium to consult other judges of the Supreme Court and High Courts and members of the Bar regarding particular appointments.

The effort by the Parliament to alter the collegium system of appointing judges in the form of the National Judicial Appointments Commission Act, 2015 has been thwarted by the Supreme Court.[105] In this latest judgement, the Supreme Court struck down the establishment of National Judicial Appointments Commission and upheld the constitutionality of the collegium system of appointment. However, as a result of this judgment and the national debate that was triggered by it, the higher judiciary and the government have been seeking to develop a Memorandum of Procedure for appointment of judges in the higher judiciary.[106] It is expected that a finalisation of this Memorandum of Procedure would facilitate and more robust and purposive consultative element in the process of judicial appointments.

V. CONCLUSION

It is not always possible for power to be shared between governmental organs or institutions. An arrangement of power being exercised conjunctively is not necessarily a pragmatic way of decision making. Thus, the process of consultation is a device through which it can be ensured that an institution does not exercise its power in an arbitrary manner. Ensuring that power is not exercised arbitrary acquires an even greater significance in the context of judicial appointments. However, much depends on the manner in which the consultative process is structured. As we have seen, in the jurisdictions of Australia, United Kingdom, South Africa and India, some degree

of consultative process has been invariably mandated by the constitutional framework. In no jurisdiction has the power of appointing judges has been vested with an institution without the requirement of a consultative process. Also, in all the jurisdictions barring Australia, consultation with existing members of the higher judiciary is a necessary component of the constitutional mandate. Even in Australia, the practice of consulting members of the judiciary is prevalent, though not pursuant to a legal mandate but more in the form of an expected practice.

We can also see that the appointing authority in all these countries do not necessarily confine the consultative process to the functionaries mandated under the constitution. It is quite common in all these countries for the appointing authority to seek opinions from other sources as well.

However, one common deficiency in the consultative process of all these countries is the absence of

definitive reference in relation to the contents of the consultation. What questions about the candidate may be asked in the consultation? Whether the opinion offered in the consultation has to be in writing or has to be reduced to writing? Whether absence of conflict of interest is established before seeking consultation?

These are just few of the many questions which remain unclear and unresolved in terms of the consultative process in these countries. In the opinion of the author, in all these countries, the consultative process is sufficiently ingrained in the decision making process and cannot be dispensed with in future. However, the terms of consultation are required to be settled beyond the preliminary framework which exists at this point of time. For consultation to be truly effective, it is essential that it operates within a more definitive and tangible parameters.

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[1] Gretchen Carpenter, Judiciaries in The Spotlight, 39:3 THE COMP. AND INT'L. JOUR. OF SOU. AFR. 361(2006); "It is generally agreed that an independent judiciary is a prerequisite for constitutionality (or the rule of law, the preferred term in Britain and most of the states whose constitutional systems owe their origins to British concepts)."

[2] Sandra Day O'Connor, Judicial Accountability Must Safeguard, Not Threaten, Judicial Independence: An Introduction, 86 DEN. UNI. L. REV. 1 (2008-2009); The author notes that the separation of the power of making the laws from the power of interpreting them strengthens the ideal of Rule of Law.

[3] J. Clifford Wallace, An Essay on Independence of the Judiciary: Independence from What and Why, 58 N.Y.U. ANNUAL SURVEY OF AMERICAN LAW 241 (2001-2003); The author explains the futility of constitutional limitations on the powers of the government if the very authority supposed to preserve such limitations is controlled by the government.

[4] Greg Mayne, 'Judicial integrity: the accountability gap and the Bangalore Principles' (November 12, 2014) http://www.birosag.hu/sites/default/files/allomanyok/kozadatok/obh/7._sz._melleklet__gcr_chapter_3_final.pdf; Compromise in standards of judicial independence in undemocratic countries has direct had direct consequences on rule of law and human rights.

[5] David Pimentel, *Reframing the Independence* v. *Accountability Debate*: Defining Judicial Structure in light of Judge's Courage and Integrity' 7 CLEV. ST. L. REV 1 (2009); "Judicial independence is a bulwark of the Rule of Law". If the law is to be enforced even handedly, the judges must be free to act independently in applying the law and rendering judicial decisions. If ours is to be a government of laws and not men, we must have a court system that respects law more than it respects the power of any individual(s)."

[6] Alexander Hamilton, 'The Federalist No. 78' (October 5, 2014) http://www.constitution.org/fed/federa78.htm; Hamilton asserts that constitutional limitations on governmental power can be preserved only through courts of law having the power of judicial review. Without such power being vested in the courts, guarantee of any rights is meaningless. For more see Randy J Holland and Cynthia Gray, Judicial Discipline: Independence with Accountability 5 WIDENER LAW SYMPOSIUM JOURNAL 117 (2000).

[7] Peter M Shane, Interbranch Accountability in State Government and the Constitutional Requirement of Judicial Independence 61 (3) LAW AND CONTEMPORARY PROBLEMS 21 (1998); Judicial Independence is considered to be a constitutional value at par with other traditional values like separation of powers.

[8] Supra n. 3; "An equal and independent judiciary provides us the best hope to protect our fundamental values as expressed in the Constitution."

[9] Id.; Ideals of justice and human rights guaranteed under any constitution are not capable of being realised without an independent judiciary.

[10] Steven Lubet, Judicial Discipline and Judicial Independence 61 (3) LAW AND CONTEMPORARY PROBLEMS 59 (1998); Without an independent judiciary, the promises under the constitutional are not beyond the possibility of being violated by the governmental organs.

[11] Supra n. 3; The people of the country are unlikely to approach the courts if the judiciary is perceived to be under the influence of other organs.

[12] Id.; The judiciary is the most non-violent mechanism accessible to the people for the protections of their rights against a powerful executive.

[13] Supra n. 2.

[14] Sir Harry Gibbs, The Appointment and Removal of Judges (17) FEDERAL LAW REVIEW 141 (1987); The appointment of proper judges is of critical importance to the society and the power to appoint judges should not be entrusted with people who integrity is not beyond reproach. Also see Supra n. 5.

[15] Supra n. 5.

[16] Supra n. 3; Adopting a sound method for the selection of judges on proper parameters is likely to reduce the possibility of corruption.

[17] Supra n. 14; "If the personal and professional qualities of a candidate for judicial appointment are thoroughly investigated in the first place, and if there is no weakening of the resolve that none but persons of the highest character and competence should ever be appointed, judicial misconduct should remain a rarity, even if an unsuitable appointee occasionally slips through the net."

[18] KARL LOWENSTEIN, POLITICAL POWER AND THE GOVERNMENTAL PROCESS 231-37 (2nd Ed., 1965 The University of Chicago Press).

[19] Mark S. Cady and Jess R. Phelps, Preserving the Delicate Balance Between Judicial Accountability and Independence: Merit Selection in the Post-White World 17 CORNELL JOURNAL OF LAW AND PUBLIC POLICY 343 (2007-2008).

[20] Roger Handberg, Judicial Accountability and Independence: Balancing Incompatibles? 49 UNIVERSITY OF MIAMI LAW REVIEW 127 (1994-1995); The methods for the selection of judges are always evolving and change periodically with the changes in the perception of the society.

[21] Supra n. 19; Cady and Phelps have identified five main types of judicial selections methods prevalent in different states of USA. Two of the methods are partisan elections and non-partisan elections. Two appointment methods are also; one by the governor and one by the legislature. The other method which is followed is a hybrid method having elements of both election and appointment which is generally known

as the merit plan.

[22] TONY BLACKSHIELD & GEORGE WILLIAMS, AUSTRALIAN CONSTITUTIONAL LAW AND THEORY: COMMENTARY AND MATERIALS 586 (5th Ed., 2010, The Federation Press).

[23] The Commonwealth of Australia Constitution Act, 1900, Section 71.

[24] The Commonwealth of Australia Constitution Act, 1900, Section 73.

[25] Julie-Anne Kennedy and Anthony Ashton Tarr The Judiciary in Contemporary Society: Australia 25 CASE WESTERN RESERVE JOURNAL OF INTERNATIONAL LAW 251 (1993); The executive authority in Australia is exclusively in charge of deciding upon the appointment of judges at all levels of judicial hierarchy.

[26] Rachel Davis and George Williams, Reform of the Judicial Appointments Process: Gender and the Bench of the High Court of Australia 27 MELBOURNE UNIVERSITY LAW REVIEW 819 (2003); The constitutional provision requiring the Governor-General in Council to appoint the judges of the High Court essentially means the decisions taken by the Governor-General in Council as advised by the federal government.

[27] Supra n. 25.

[28] Supra n. 26; The Governor-General in Council has no active role to play in the matter of the appointment of High Court and the decision in this regard is taken entirely by the executive government at the federal and state levels.

[29] Supra n. 25; The role played by the Governor-General or the Governor is mainly formal in nature.

[30] H.P. Lee, Appointment, Discipline and Removal of Judges in Australia in H.P. LEE (ED), JUDICIARIES IN COMPARATIVE PERSPECTIVE 28 (Cambridge University Press 2011).

[31] Supra n. 25; "In practice, therefore, the Attorney General, as the executive in charge of putting forward nominations to the Cabinet, is vested with considerable responsibility."

[32] HCA 1979, s. 6.

[33] Supra n. 30.

[34] Supra n. 26; Though there is a statutory requirement of consultation, there is no clarity on the extent and form of such consultative process and there is also evidence of any effect of this consultative process on the decision making process in case of judicial appointments.

[35] Id.; It is also an usual practice for the Attorney General to hold informal discussions and consultations with different stakeholders including the Chief Justice.

[36] Senate Legal and Constitutional Affairs References Committee, Australia's Judicial System and the Role of Judges, para 3.12 (January 13 2015) http://www.aph.gov.au/~/media/wopapub/senate/committee/legcon_ctte/completed_inquiries/2008_10/judicial_system/report/report_pdf.ashx.

[37] Supra n. 14; "There is no formal procedure for consultation between the executive and the judiciary or the legal profession."

[38] Id.; "However in practice it is not uncommon for an Attorney-General to consult with the Chief Justice or with other members of the profession with regard to a prospective appointment, but sometimes an appointment may be made without consultation and sometimes advice may be received but ignored."

[39] Supra n. 36 at para 3.17.

[40] Id.

[41] Supra n. 26; The consultative process is not based on any specific set of inquires on identified criteria. It is most often in the nature of seeking personal opinion in relation to prospective appointees.

[42] Id. Also see Sir Harry Gibbs, The Appointment of Judges 61 AUSTRALIAN LAW JOURNAL 7(1987).

[43] Supra n. 30; This is also evident from a discussion paper issued by the office of the Federal Attorney General in 1993.

[44] Michael Lavarch, The Appointment of Judges in AUSTRALIAN INSTITUTE OF JUDICIAL ADMINISTRATION (Ed), COURTS IN A REPRESENTATIVE DEMOCRACY 153 (Melbourne 1995); "If equity could be said to vary depending on the size of the Chancellor's foot, then the selection process, for Commonwealth judges at least, can alter with each Attorney-General."

[45] Supra n. 25; The ratification of a nomination is the collective decision of the cabinet.

[46] PETER LEYLAND, THE CONSTITUTION OF THE UNITED KINGDOM: A CONTEXTUAL ANALYSIS 202 (Hart Publishing 2012); "The Appellate Committee of the House of Lords was replaced by a Supreme Court with broadly similar appellate jurisdiction in October, 2009."

[47] Bradley D. Riel, Reformation of the UK Judiciary and its Effect on Patent Litigation 21 ALBANY LAW JOURNAL OF SCIENCE & TECHNOLOGY 445 (2011); Thus, all the devolution issues arising from Scotland Act, 1998, Government of Wales Act, 1998, and Northern Ireland Act, 1998 are now adjudicated by the Supreme Court.

[48] Supra n. 46.

[49] JO BOYLAN-KEMP, ENGLISH LEGAL SYSTEM-THE FUNDAMENTALS 184 (First Edition, Thomson Reuters 2008); "However, powers of the Supreme Court of England and Wales will not go as far as its counterparts in other jurisdictions which have a similar court system. For example in America the Supreme Court can strike down legislation, whereas that power is UK will still be reserved for Parliament only."

[50] Kate Malleson, Appointment, Discipline and Removal of Judges: Fundamental Reforms in the United Kingdom in H.P. LEE (ED), JUDICIARIES IN COMPARATIVE PERSPECTIVE 120 (Cambridge University Press 2011).

The Judicial Appointments Commission for England and Wales is a permanent body with larger membership.

[51] Id.

[52] Constitutional Reforms Act, 2005, Schedule 8 para 1.

[53] Constitutional Reforms Act, 2005, Schedule 8 para 3.

[54] Constitutional Reforms Act, 2005, Schedule 8 para 6(2).

[55] Constitutional Reforms Act, 2005, Schedule 8 para 6(3).

[56] Constitutional Reforms Act, 2005, Schedule 8 para 6(4).

[57] Constitutional Reforms Act, 2005, Section 26(5).

[58] Constitutional Reforms Act, 2005, Section 27(1).

[59] Constitutional Reforms Act, 2005, Section 27(2).

[60] Constitutional Reforms Act, 2005, Section 27(2).

[61] Constitutional Reforms Act, 2005, Section 27(3).

[62] Constitutional Reforms Act, 2005, Section 28(2).

[63] Constitutional Reforms Act, 2005, Section 28(5).

[64] Constitutional Reforms Act, 2005, Section 29(2).

[65] Constitutional Reforms Act, 2005, Section 29(3).

[66] Constitutional Reforms Act, 2005, Section 30(1).

[67] Constitutional Reforms Act, 2005, Section 26(2)(a).

[68] Constitutional Reforms Act, 2005, Section 26(2)(b).

[69] Supra n. 50 at 122; "In practice, this role had been reduced by the 2005 provisions to little more than a rubber stamp, since the legislation did not set out any basis on which the Prime Minister could reject the name provided."

[70] Constitution of the Republic of South Africa 1996, Section 167(2).

[71] Constitution of the Republic of South Africa 1996, Section 167(3)(a).

[72] Constitution of the Republic of South Africa 1996, Section 167(3)(b).

[73] Constitution of the Republic of South Africa 1996, Section 167(4).

[74] Constitution of the Republic of South Africa 1996, Section 167(5).

[75] Constitution of the Republic of South Africa 1996, Section 174(3) and Section 174(4).

[76] Supra n. 25.

[77] Supra n. 67.

[78] Infra n. 96.

[79] Constitution of the Republic of South Africa 1996, Section 178(1).

[80] Hugh Corder, Appointment, Discipline and Removal of Judges in South Africa in H.P. LEE (ED), JUDICIARIES IN COMPARATIVE PERSPECTIVE 101 (Cambridge University Press 2011); "Thus, of the twenty-three ordinary members of the JSC, fifteen are selected more for their broadly political views than their standing as lawyers, of whom at least twelve are likely to be loyal in the first instance to the ruling party in Parliament."

[81] Supra n. 1; "It may be seen from the way in which the JSC is composed that it represents a reasonable balance between politicians and legal practitioners, and even provides for the opinion of opposition political parties to be recognised - probably as sensible a compromise as one could hope for."

[82] For more see Supra n. 80 at 100.

[83] Supra n. 80 at 102; "The appointment of justices to the CC is significantly different, reflecting their immense authority as the final arbiter on the reach and distribution of the lawful exercise of power under the Constitution."

[84] Constitution of the Republic of South Africa 1996, Section 174(4).

[85] Supra n. 80 at 102; "Although this is not explicitly stated, the reference back to the JSC may occur only once; in fact, this step has not proved necessary to date."

[86] Constitution of the Republic of South Africa 1996, Section 174(3).

[87] Supra n. 80 at 103; "The interviews were carefully presided over by the then Chief Justice, Michael Corbett, who from time to time intervened to ensure the fairness of questioning different candidates. He did this in accordance with a seven-page document, 'Guidelines for questioning candidates for nomination to the Constitutional Court', dated 26 September 1994, which sets out various selection criteria, as follows; independence, open-mindedness, integrity and courage; diversity, empathy and sensitivity; intellect; fairness, judgment and perceptiveness; stamina and industry; and the (fostering of) vigorous internal debate."

[88] Supra n. 80 at 103; "This was fiercely resisted inside the ranks of the commission, chiefly by the academic representative, Professor Mureinik…"

[89] Supra n. 80 at 103; "Mureinik's view, however, triumphed, and the JSC now generally operates as it were a court of law when interviewing candidates for the bench, but not when it deliberates on its recommendations."

[90] T.R. Andhyarujina, Judicial Accountability: India's Methods and Experience in CYRUS DAS AND K CHANDRA (EDS), JUDGES AND JUDICIAL ACCOUNTABILITY (1st Indian Reprint, 2004, Universal Law Publishing Co.) 109; The court has given rulings in relation to maintenance of clean environment, has framed guidelines for admission procedure to educational institutions, has held the right to education as a part of the fundamental rights of all citizens and has also taken measures to prevent sexual harassment of women in workplaces.

[91] O. CHINAPPA REDDY, THE COURT AND THE CONSTITUTION OF INDIA: SUMMITS AND SHALLOWS 301, (Oxford University Press 2010); "The Supreme Court acts as the custodian of the conscience of the Constitution, when occasion arises in the course of the exercise of its jurisdiction."

[92] Arvind P. Datar, Judicial Appointments: The Indian Perspective in SANTOSH PAUL (ED), CHOOSING HAMMURABI: DEBATES ON JUDICIAL APPOINTMENTS 59 (1st Edition, 2013 Lexis Nexis); The author has noted how the Supreme Court has a more extensive jurisdiction than any comparable judicial authority.

[93] Constitution of India, Article 132, Article 133 and Article 134.

[94] Constitution of India, Article 131.

[95] Constitution of India, Article 32.

[96] For more see *U.N.R. Rao* v. *Indira Gandhi*, (1971) 2 SCC 63 : AIR 1971 SC 1002, *Samsher Singh* v. *State of Punjab*, (1974) 2 SCC 831 : AIR 1974 SC 2192.

[97] Supra n. 92; The author has explained the position of the President vis-a-vis the Council of Minister. It has been asserted that as the President has to act in accordance with the advice of the Council of Ministers, any decision regarding judicial appointments cannot be said to be an independent decision by the President.

[98] Santosh Paul, Introduction: The Eternal Debate on Judicial Appointments in SANTOSH PAUL (ED), CHOOSING HAMMURABI: DEBATES ON JUDICIAL APPOINTMENTS xix (1st Edition, 2013, Lexis Nexis); "The controversy regarding judicial appointments revolves around the debate as to whose opinion has primacy in the exercise of the power to appoint: Is it the Chief Justice of India or is it the Executive being the government of the day?"

[99] Supra n. 92 at 58; He has observed the difficulties experienced in the implementation of a seemingly simple provision. He notes the constant power struggle between the judiciary and the executive over a favourable interpretation of the appointment provisions.

[100] (1993) 4 SCC 441 : AIR 1994 SC 268.

[101] (1998) 7 SCC 739 : AIR 1999 SC 1.

[102] Supra n. 90 at 115; The ruling in 2nd Judges case effectively meant that instead of the process of the President consulting the Chief Justice, there was a mere formal consultation of the President by the Chief Justice.

[103] Supra n. 90 at 115.

[104] Supra n. 100 at para 68.

[105] *Supreme Court Advocates-on-Record-Assn.* v. *Union of India*, (2016) 5 SCC 1.

[106] New MoP suggests the Appointment of Three Judges of Supreme Court from distinguished Lawyers and Jurists, (April 30, 2016) http://www.livelaw.in/new-mop-suggests-appointment-3-judges-supreme-court-distinguished-lawyers-jurists/.